82-1095

NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

R. PULLEY, Warden of the California State Prison at San Quentin,

Petitioner,

v.

ROBERT ALTON HARRIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether, in addition to the procedures whereby a trial court and jury impose a death sentence, the Federal Constitution requires any specific form of "proportionality review" by a court of statewide jurisdiction prior to the execution of a state death judgment.

2. If so, what is the constitutionally required focus, scope, and procedural structure of such a review.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, R. Pulley, Warden of the California State Prison at San Quentin, respectfully requests that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit vacating the dismissal of Harris'

petition for writ of habeas corpus by the United States District Court for the Southern District of California, and ordering that the writ be granted unless the California Supreme Court conducts a "proportionality review" within 120 days. A petition for rehearing was denied November 15, 1982, and the opinion was modified. The suggestion for rehearing en banc was rejected. On November 29, 1982, the court of appeals granted a stay of the mandate until December 30, 1982.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, vacating the District Court's dismissal of Harris' petition for writ of habeas corpus (Harris v. Pulley, No. 82-5246 filed Sept. 16, 1982) appears as Appendix A to this petition. A copy of the Ninth Circuit's order denying the

petitions for rehearing and rejecting the suggestion for rehearing en banc, and modifying the original opinion appears as Appendix B to this petition. A copy of the order of the United States District Court for the Southern District of California appears as Appendix C to this petition.[1/]

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was filed on September 16, 1982. A timely petition for rehearing, with suggestion for rehearing en banc, was denied November 15, 1982. This petition

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1. At the suggestion of the Clerk of this Court, at the same time as the filing of this present petition we have lodged with this Court ten copies of the opinion of the California Supreme Court affirming both the conviction and the judgment of death. This opinion, on direct appeal, was filed February 11, 1981, and is reported at 28 Cal.3d 935.

is filed within 60 days of that date and is therefore timely. This Court's jurisdiction is invoked under 28 U.S.C. section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. United States Constitution, Amendments Five, Eight and Fourteen.

2. California Constitution, Article I, section 17.

The text of each of the above provisions is set forth in Appendix D to this petition.

STATEMENT OF THE CASE

In an information filed by the District Attorney of San Diego County, California, Robert Alton Harris was charged with the kidnap, robbery, and murder of John Mayeski and Michael Baker. Harris was further charged with receiving stolen property, and being a convicted

felon in possession of a concealable firearm. It was additionally alleged that Harris had served a prior prison term for voluntary manslaughter, and that he was armed with and did personally use a firearm during the kidnap, robbery and murder of the two boys. Finally, with respect to each of the two counts of murder special circumstances were alleged which qualified Harris for the death penalty. As to each murder it was alleged that the murder was committed during the commission of a robbery. It was also alleged that each murder was committed during the commission of a kidnap for the purposes of robbery. It was also alleged as to each murder that Harris was guilty of more than one murder.

Harris' trial began November 30, 1978, and on January 23 and 24, 1979,

the jury found him guilty of all counts, found to be true the allegations of a prior prison term and arming and use of firearms, found the two murders to be in the first-degree, and found the special circumstances alleged with regard to the murders to be true.

A penalty phase began January 29, 1979, and on February 8, 1979, the jury declared the penalty for each count of murder to be death. A motion for new trial was denied and a judgment of death was signed on March 6, 1979.

An automatic appeal from the judgment of death was taken to the California Supreme Court which, on February 11, 1981, affirmed the conviction and the judgment of death.

Harris pursued state habeas corpus through all three levels of California state courts, with his peti-

tion being denied by the California Supreme Court on January 13, 1982.

On March 5, 1982, (eleven days prior to his scheduled execution) Harris filed a 133 page petition for habeas corpus in the United States District Court for the Southern District of California. Following a hearing held March 12, 1982, the District Court found Harris' contentions to be legally without merit and dismissed the petition, granting a certificate of probable cause. On that same day the United States Court of Appeals for the Ninth Circuit, in a telephonic hearing, granted a stay of execution pending an expedited appeal to that court.

Briefs were filed on an expedited schedule in the Court of Appeals and, on May 11, 1982, oral argument was held in San Francisco. On September 16,

1982, the Court of Appeals issued its opinion vacating the District Court's dismissal of Harris' petition with instructions that the writ should be granted unless the California Supreme Court holds a "proportionality review" within 120 days of the filing of the opinion. Our petition for rehearing and suggestion for rehearing en banc were denied November 15, 1982, in an order which also modified the opinion. On November 29, 1982, a stay of the mandate was granted to December 30, 1982.

STATEMENT OF FACTS

The facts surrounding Harris' crimes are completely recounted in the California Supreme Court opinion on direct appeal. (People v. Harris (1981) 28 Cal.3d 935, 943-948.) These facts are not necessary to the determination of the issue presented in this petition.

Nonetheless, the following brief summary of Harris' crimes is offered to complete the context in which the present issue is presented.

In July of 1978 appellant had been on parole for six months from a previous homicide conviction when he and his younger brother decided to rob a bank in Mira Mesa, a suburb of San Diego. Just prior to commiting the robbery Harris decided against using his own vehicle as a get-away car and, on the spur of the moment, decided to steal a car for that purpose. In the parking lot of a Jack-in-the-Box hamburger stand, across the street from the bank, he confronted John Mayeski and Michael Baker, two sixteen-year-old friends who were eating hamburgers in Mayeski's car prior to embarking on a day's fishing.

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At gunpoint Harris kidnapped the two boys and drove them to a secluded area by a nearby lake where he executed them, shooting one boy in the back and chasing the other screaming youth into the brush where he too was shot to death. Harris then returned to the first youth where he took special relish in firing a final and unnecessary bullet into that boy's head just to see what the effect would be like. Harris then ate the breakfast of hamburgers which the dead boys had left, laughing at his younger brother for not having the stomach to do the same. Using the boys' car, Harris completed the bank robbery, but was followed by customers of the bank to the home in Mira Mesa where he had been staying. He was promptly apprehended.

Harris confessed six times before trial and once again during the

penalty phase. The sixth and seventh confessions were interrupted by his testimony during the guilt phase where he denied killing the boys and blamed his younger brother for it. In the penalty phase it was also shown that while in jail awaiting trial Harris sodomized and threatened to kill a fellow inmate and was twice caught in possession of deadly weapons, first a knife, then a wire garrote. He also staged a sham suicide attempt, cutting his forearm and mixing the blood with a large amount of water to provide the necessary melodrama.

HOW THE FEDERAL QUESTION IS PRESENTED

Harris invoked the United States District Court's jurisdiction under 28 U.S.C. section 2254 by filing a petition for writ of habeas corpus March 5, 1982. In this petition, inter alia, Harris complained that he had been denied

a "proportionality review", alleging that such a review is required by the Federal Constitution.

On dismissal of his petition by the District Court an appeal was taken to the United States Court of Appeals for the Ninth Circuit where the same issue, inter alia, was presented.

In its opinion, the Ninth Circuit ruled that California's death penalty statute is constitutional, but that a "proportionality review" is required both under state law, and under the federal constitution as amplified by this Court's decisions in Gregg v. Georgia (1975) 428 U.S. 153; Proffitt v. Florida (1975) 428 U.S. 242; and Jurek v. Texas (1975) 428 U.S. 262. The ruling of the Ninth Circuit precludes the imposition of the death sentence against Harris unless the California Supreme Court con-

ducts a "proportionality review" within 120 days. Petitioner urges that California's statutory scheme meets all the requirements of Gregg, Proffitt and Jurek, and that no additional "proportionality review" is required.

REASONS FOR GRANTING THE WRIT

The opinion of the Ninth Circuit holds that, in addition to the established trial court procedures designed to give capital juries adequate information and guide their discretion, the highest court of each state must conduct a separate and distinct "proportionality review" under the compulsion of the federal constitution. This decision is in conflict with the decisions of this Court. In both Gregg and Proffitt "proportionality review" was portrayed as a useful but constitutionally unnecessary additional safeguard

to the procedures implemented at the trial level. In Jurek, this Court approved the Texas death penalty system which contains no provisions whatsoever for proportionality review.

The Ninth Circuit's opinion also conflicts with the decisions of both this Court and the United States Court of Appeals for the Fifth Circuit denying relief to and allowing the execution of Texas prisoner Charlie Brooks without Brooks ever having been afforded the "proportionality review" referred to in the present case. (Brooks v. Estelle (5th Cir. No. 82-1613 decided December 6, 1982; Brooks v. Estelle United States Supreme Court number A-504, application for stay and petition for certiorari denied December 6, 1982.)

The issue is a vastly important one of nationwide concern since the Ninth

Circuit is the first circuit to specifically hold that "proportionality review" is constitutionally mandated. Since this Court has approved of the Texas system which contains no such review, and has allowed a protesting petitioner's execution under that system all states are once again at sea on the issue of what is constitutionally required for the valid execution of a death judgment. Only this Court can settle that question.

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ARGUMENT

I

INTRODUCTION

It has been well over a decade that the efforts of the states of this union to afford their citizens the much desired protections of capital punishment have labored under a dark constitutional cloud. This has been a time of judicial confusion over the evolving standards that our federal Constitution imposes on the ability of the states to defend themselves by executing their most vicious murderers. From Furman v. Georgia (1972) 408 U.S. 238 through the series of cases led by Gregg v. Georgia (1975) 428 U.S. 153 the citizens of California and its sister states have repeatedly and unequivocally gone to the polls to express their mounting concerns for their personal safety and their judgment that

capital punishment is appropriate, desired, and needed.

Following Gregg, California enacted yet another death penalty statute in 1977. Robert Alton Harris was tried and condemned under this statute, and his case is the first to have travelled the gauntlet of state and federal courts testing the validity of the California system.

The validity of the California death penalty statute has been upheld at every step ot state and federal review, including the most recent opinion of the United States Court of Appeals for the Ninth Circuit. However, the Ninth Circuit has held, for the first time anywhere, that in addition to the validity of the trial court procedures which, in response to Gregg, ensured the submission of adequate information to the

sentencing authority and properly guided the discretion of that authority, an additional procedure is required. Based on the fortuitous appearance of a "proportionality review" in the Georgia statute examined in Gregg, and based on Florida case law described by this Court in Proffitt v. Florida (1975) 428 U.S. 242, the Ninth Circuit has held that the federal constitution precludes the execution of a state death judgment until the highest court of that state has conducted a separate and discrete "proportionality review" designed to compare the given case with other cases in the state to determine whether the penalty in the given case is proportionate to other sentences imposed for similar crimes. (Appendix A, p. 20.)

Thus the uncertainty continues after more than a decade of effort. As

we will show in this petition, this Court has approved the Texas statutory scheme which contains no such "proportionality review". Furthermore, both the Fifth Circuit and this Court have allowed the execution of a Texas inmate in the face of his complaints concerning the lack of such a "proportionality review". In face of this background, an obviously intolerable conflict exists which only this Court can resolve.

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II

AFTER A STATE DEFENDANT HAS BEEN SENTENCED TO DEATH UNDER A CONSTITUTIONALLY VALID TRIAL COURT PROCEDURE THERE IS NO ADDITIONAL CONSTITUTIONAL REQUIREMENT OF "PROPORTIONALITY REVIEW" BY THE STATE'S HIGHEST COURT

After years of uncertainty as to the constitutional requirements of a valid state death penalty statute this Court made the requirements relatively clear in a series of 1975 cases led by Gregg v. Georgia (1975) 428 U.S. 153. In that case, which clarified previous holdings on the subject this Court concluded:

> "In summary, the concerns expressed in Furman [v. Georgia (1972) 408 U.S. 238] that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance. As a general proposition these

> concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information." (Gregg v. Georgia, supra, at p. 195.)

In Gregg, this Court approved the statutory scheme providing for the imposition of the death penalty in Georgia. The court also approved the schemes of Florida (Proffitt v. Florida (1975) 428 U.S. 242) and Texas (Jurek v. Texas (1975) 428 U.S. 262.) In all three cases, the court concluded that the statutory scheme surrounding the imposition of the death penalty in Georgia, Florida, and Texas ensured that the sentencing authorities in those states would be provided with adequate information and sufficient guidance to guard against the

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arbitrary and capricious implementation of the death penalty.

However, in Gregg this Court noted that the Georgia statute has, "an additional provision designed to assure that the death penalty will not be imposed on a capriciously selected group . . . ." (Gregg v. Georgia, supra, at p. 204.) This provision is the statutory proportionality review, and every reference to it by this Court makes it apparent that it was seen as merely frosting on an already constitutional cake. Every reference to it is punctuated by the word "additional": "An important additional safeguard" (Gregg v. Georgia, supra, at p. 198), "an additional provision" (Gregg v. Georgia, supra, at p. 204), "in addition, the review function of the Supreme Court of

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Georgia affords additional assurance . . . ." (Gregg v. Georgia, supra, at p. 207.

Furthermore, in Proffitt this Court noted that the Florida statute contained no such "proportionality review" provision. However, the statute did provide for an automatic review by the state supreme court, which court, "considers its function to be to '[guarantee] that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under the similar circumstances in another case . . . . If a defendant is sentenced to die, this Court can review that case in light of the other decisions and determine whether or not the punishment is too great.' State v. Dixon 283 So.2d 1, 10 (1973)." (Proffitt, supra, at p. 271, emphasis added.)

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Thus, in Florida although there is no statutory or case law requirement that a "proportionality review" be conducted in each case, the state supreme court has declared that it has the power to provide such a review in an appropriate case. It is significant to note that in deciding the Proffitt case, the Florida Supreme Court made no mention whatsoever of "proportionality review", and there is no indication that any specific review was done at the state level in that case. (Proffitt v. State (1975) 315 So.2d 461.)

In Jurek, the Texas statute provided for no "proportionality review" whatsoever, and there is no indication that the Texas Court of Criminal Appeals considered such a review its responsibility. Specifically, a reading of the Jurek case as it was decided by the Texas

Court of Criminal Appeals reveals that no consideration whatsoever was given to any form of "proportionality review ". (Jurek v. State (1975) 522 S.W.2d 934.) Rather, the Texas scheme was approved by this Court with no more showing than that, "by providing a prompt judicial review of the jury's decision in a court with statewide jurisdiction, Texas has provided a means to promote the even-ended rational, and consistent imposition of death sentences under law." (Jurek v. Texas, supra, 428 U.S. at p. 276.)

It seems clear from a reading of Gregg and Proffitt that "proportionality review" as it exists in those states was not deemed by this Court to be an essential element to the constitutional validity of their death sentence schemes. This conclusion is made virtually inescapable, however, by a reading

of this Court's opinion in Jurek. As this Court discussed the Texas scheme no mention whatsoever was made of "proportionality review". It is apparent that none exists in Texas, and it is apparent from this Court's opinion in Jurek that its absence in no way lessened the constitutional validity of that state's system.

Recent litigation involving a Texas inmate further underscores the conclusion that this Court has not required any "proportionality review" as a prerequisite to execution of a state death judgment. On December 7, 1982, Texas executed Charlie Brooks. It is apparent from a reading of the opinion of the Texas Court of Criminal Appeals in Brooks' case (Brooks v. State (1979) 599 S.W.2d 312) that no express "proportionality review" was conducted by

the Texas court in that case. After a denial of federal habeas corpus relief, the United States Court of Appeals for the Fifth Circuit denied him a stay to pursue a leisurely appeal and ruled against him on the merits of his expedited appeal. (Brooks v. Estelle (5th Cir. 82-1613, filed December 6, 1982).) Finally, this Court denied Brooks' application for stay and denied his petition for writ of certiorari in the face of his complaint that he had been denied the very "proportionality review" that the Ninth Circuit has ordered California to provide in this case. (Brooks v. Estelle United States Supreme Court A-504, filed December 6 1982.)

Thus, it has been made clear that this Court will uphold state death penalty schemes which do not include a separate "proportionality review" follow-

-ing the trial. In fact, both the Fifth Circuit and this Court have made it clear that executions will be allowed without the necessity of conducting the sort of "proportionality review" ordered by the Ninth Circuit here.

The reasons for this are clear. The goal of "proportionality review" is the same goal sought by the sentencing procedures which have been deemed to be constitutionally required. Thus, when a state statute provides that the sentencing authority will be given all relevant information, and then adequately guides the sentencing authority's exercise of its discretion that alone satisfies our fundamental constitutional concerns that decisions to impose the death penalty will be based on the particularized nature of the crime and the defendant, and that the decision will be

properly channelled to avoid wanton and freakish results. (See, Spinkellink v. Wainwright (5th Cir. 1978) 578 F.2d 582; Smith v. Balkcom (5th Cir. 1981) 660 F.2d 573.)

While it is perfectly proper for the Georgia Legislature to provide an additional safeguard, and is proper for the Florida Supreme Court to stand ready to make an additional examination in a proper case, such procedural matters are in excess of minimum constitutional demands, and are matters of individual state prerogative.

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III

CALIFORNIA STATE LAW DOES NOT REQUIRE A "PROPORTIONALITY REVIEW" FOLLOWING A DEATH JUDGMENT AND EVEN IF IT DID IT WOULD PROVIDE NO BASIS FOR THE FEDERAL COURTS TO BLOCK AN EXECUTION

The Ninth Circuit opinion displays an alarming lack of clarity as to the basis for its holding requiring the conduct of a "proportionality review" by the California Supreme Court. Most of the Ninth Circuit's language appears to be based on a conclusion that the California Supreme Court has itself established a requirement under state law to conduct a proportionality review. (Appendix A, pp. 2, 20, 56.) In fact, the only language in the Ninth Circuit's opinion that can be read as a suggestion that the proportionality review requirement springs from the federal constitution is the *en passant* obser-

vation that the California Supreme Court, "gave no indication that any type of proportionality review, as required under Gregg v. Georgia and Proffitt v. Florida, was undertaken." (Appendix A, p. 21.)

Since it is fundamental that such a state law rule, if it existed, would not be a proper basis for federal intervention, (see Engle v. Isaac __U.S.__ (April 5, 1982) 50 U.S.L.W. 4376) we focus our discussion here on the question of "proportionality review" under the federal constitution. However, given the language of the Ninth Circuit's opinion it seems appropriate to demonstrate that the California Supreme Court has clearly not assumed any obligation under any body of law to conduct the kind of "proportionality review" ordered by the Ninth Circuit.

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Since this Court's series of cases led by Gregg v. Georgia, supra, it has been popular among death defendants to argue that "proportionality review" is constitutionally required. In People v. Frierson (1979) 25 Cal.3d 142, and People v. Jackson (1980) 28 Cal.3d 264, the California Supreme Court was presented with arguments that "proportionality review" was constitutionally required but that the California death penalty system operated to preclude the California Supreme Court from filling this supposedly required function. In the face of this argument the California Supreme Court in Frierson began with a citation to its previous decision in Rockwell v. Superior Court (1976) 18 Cal.3d 420, 432, "wherein we express our own doubt that proportionality review was deemed essential by a majority of the

justices in Gregg . . . ." (People v. Frierson, supra, at p. 181.) The California Supreme Court went on to note that this Court has either expressly approved, or has denied certiorari with regard to state schemes which include no more "proportionality review" than a court system willing to examine proportionality when the issue arises. (People v. Frierson, supra, at p. 182; see e.g. State v. Simants (1977) 250 N.W.2d 881, 890.)

However, notwithstanding the California State Supreme Court's conclusion that "proportionality review" is not required, the court in Frierson went on to note that it had full power to conduct such a review under, "well established proportionality principles of general application" established by California State Supreme Court cases (In re Lynch

(1972) 8 Cal.3d 410, People v. Wingo (1975) 14 Cal.3d 169) designed to implement state constitutional provisions. (Cal. Const., Art. I, § 17, cruel and unusual punishment proscription.) This holding was reaffirmed in People v. Jackson (1980) 28 Cal.3d 264 at p. 317.)

Very recently, and apparently spurred in part by the Ninth Circuit's decision in this case, the California Supreme Court has once again addressed the issue of "proportionality review". In People v. Easley (California Supreme Court No. Crim 21117, filed December 10, 1982) the California Supreme Court affirmed both the conviction and death judgment. In a concurring opinion Associate Justice Kaus reaffirmed that the decisions in Frierson and Jackson do not constitute holdings that any "proportionality review" is required

under either federal or state law, but rather merely constituted holdings that the California Supreme Court was not precluded from holding such a review in an appropriate case. Indeed, Justice Kaus echoed the California Supreme Court's previous doubts that this Court has ever required "proportionality review." Then, having discussed this total lack of authority on the issue of "proportionality review" Justice Kaus cited directly to the Ninth Circuit opinion in this case, most particularly the Ninth Circuit's conclusion that the California Supreme Court has required itself to do such a proportionality review. In apparent consternation Justice Kaus added, "I hasten to note that the Harris decision is not yet final." (People v. Easley typed opinion of Justice Kaus, p. 5, fn. 6.)

It is thus apparent that neither the California Legislature nor the California Supreme Court has established any right to a "proportionality review" following a judgment of death. Furthermore, the California Supreme Court has expressed grave doubts that such a requirement exists under the federal constitution. Even though the California Supreme Court has said, "We stand fully prepared to afford what ever kind of proportionality review may be held constitutionally mandated by the high court." (People v Jackson 28 Cal.3d at p. 317), as we previously demonstrated this Court has not required any kind of proportionality review at all.

In the face of this, the Ninth Circuit has created an impossible situation. Disagreeing with the

California Supreme Court as to the California Supreme Court's interpretation of California law, the Ninth Circuit has ordered the overturning of the present death sentence unless California implements a state law which the California Supreme Court says does not exist.

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IV

EVEN IF SOME FORM OF "PROPORTIONALITY REVIEW IS REQUIRED, THE NINTH CIRCUIT IS INCORRECT AS TO THE NATURE OF SUCH A REVIEW AND THE STATES REQUIRE THE GUIDANCE OF THIS COURT AS TO HOW SUCH A REVIEW MUST BE CONDUCTED

Although it seems clear from this Court's actions in Jurek and Brooks that no additional "proportionality review" is required, if some such review is required the states are in dire need of some guidelines as to what form it must take. Such guidelines can only properly be provided by this Court.

The Ninth Circuit has ruled that the California Supreme Court has defaulted in its constitutional duty because the opinion of the California Supreme Court on direct appeal does not indicate that any "proportionality review" has been conducted. Yet this

Court has approved the death penalties in Jurek and Proffitt where the highest state court opinions make no more mention of "proportionality review" than does the California opinion in this case. (See Jurek v. State (1975) 522 S.W.2d 934 and Proffitt v. State (1975) 315 So.2d 461.) Furthermore, this Court has allowed the actual execution of Charlie Brooks whose appellate opinion is likewise devoid of any evidence of a "proportionality review". (Brooks v. State (1979) 599 S.W.2d 312.)

It is apparent that if some sort of review is required, at least the Ninth Circuit is incorrect in assuming that the state's highest court is under a mandatory obligation to conduct it automatically and on the record in every case. Of course this does not begin to

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address the question of what kind of review might be required, if any is.

The California Supreme Court in its decisions in Frierson, Jackson, and Easley has made it clear it is fully willing to conduct any sort of review this Court requires. The Ninth Circuit has required the California Supreme Court to conduct such a review, but has still provided no guidelines as to the constitutionally required focus, scope and procedural structure of such a review. If the federal constitution is to be read to require such a review it is absolutely necessary that the states be given the guidance only this Court can provide before embarking on the process of conducting such reviews.

In deciding what, if any, such review is required it must be remembered that the forces in moral opposition to

capital punishment have made it no secret that one of their primary legal tactics is to make capital punishment litigation so lengthy, expensive, burdensome, and complex that it will simply be beyond the fiscal means of government to execute. It is easy to see that "proportionality review" would be an ideal vehicle for delivering the coup de grace to our already sagging system.

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V

THE NINTH CIRCUIT'S OPINION IN THIS CASE IS IRRECONCILABLY IN CONFLICT WITH THIS COURT'S OPINIONS AND THE OPINIONS OF THE FIFTH CIRCUIT

As we have already demonstrated the opinions of this Court in Jurek and Brooks make it clear that executions are constitutionally permissible without the sort of "proportionality review" demanded by the Ninth Circuit in the present case. Thus the Ninth Circuit opinion in this case is irreconcilably in conflict with the past decisions of this Court. Furthermore, the present decision is in irreconcilable conflict with the decision of the Fifth Circuit upholding the penalty of death in Brooks v. Estelle (5th Cir. No. 82-1613 filed December 6, 1982).

Even if some sort of proportionality review is required, the deci-

sion in this case is still in conflict with the decisions of this Court and of the Fifth Circuit in that it requires an automatic, on-the-record "proportionality review" conducted in each case by the state's highest court. As previously indicated, neither this Court nor the Fifth Circuit have required this in the cases that have come before them.

The conflict is so dramatic and unavoidable on a subject of such great national concern that a hearing by this Court is imperative.

In its historical context, the importance of this issue can not be underestimated. For substantially over a decade, the constitutional right of American citizens to seek the protections of capital punishment has been in limbo. As the rate of violent crime has increased in our nation American citizens

have watched with increasing frustration as their clear and unambiguous efforts to establish valid death penalty laws have been met with delay, detour and defeat.

While it is true that the past decade has been a time of hesitant judicial rethinking of our national attitudes toward capital punishment, it has also been a time of increased frustration on the part of our citizens, who have no doubt at all about capital punishment and who seek to have some impact, through their government, on the most fundamental issues of personal security.

After well over a decade of clear and determined efforts to establish valid capital punishment procedures this entire nation has been unable to achieve more than a tiny handful of executions out of literally hundreds of death judgments. The vast majority of these

were volunteers who chose not to fight their executions.

Californians and all Americans deserve to have the issues settled as to what basic procedures are required by the federal constitution prior to the execution of a death judgment. Although this Court's decisions in Gregg, Proffitt, and Jurek purported to do that, the Ninth Circuit's opinion in the present case raises a whole new stumbling block affecting the majority of death judgments throughout the nation. The present case presents this Court with an opportunity to rebuild the public's confidence in its government and to prevent the waste of increasingly precious public resources which would be occasioned by prolonging the indecision over capital punishment. The time has come for the

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matter to be settled and for us, as a nation, to get on with it.

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CONCLUSION

Because the Ninth Circuit has wrongly decided a crucial issue in a manner directly in conflict with the previous decisions of this Court and the Court of Appeals for the Fifth Circuit, petitioner respectfully submits that the writ of certiorari should issue to review the decision of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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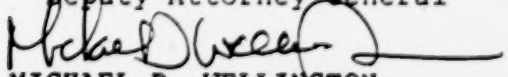

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No._____

R. PULLEY,
Petitioner,

v.

ROBERT ALTON HARRIS,
Respondent.

I, the undersigned, say: I am a citizen of the United States, over 18 years of age, employed in the County of San Diego, in which county the within-mentioned mailing occurred, and not a party to the subject cause; my business address is 110 West A Street, San Diego, California 92101.

I served the within PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT: an original and 39 copies on the United States Supreme Court as follows: Alexander L. Stevas, Clerk, United States Supreme Court, Washington, D.C. 20543, of which a true and correct copy of the document filed in the cause is affixed, by placing three copies thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectively as follows:

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I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, December 28, 1982.

Clifford E. Reed, Jr.
CLIFFORD E. REED, JR.

Subscribed and sworn to before me
this 28th day of December, 1982.

Vida M. Allen
Notary Public in and for said County and State

VIDA M. ALLEN
NOTARY PUBLIC—CALIFORNIA
COUNTY OF SAN DIEGO
My commission expires Aug. 20, 19

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